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No. 04-5462

IN THE

Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, the National Association of Criminal Defense Lawyers ("NACDL") moves for leave to file the attached brief amicus curiae in support of petitioner, Ronald Rompilla. Petitioner and Respondent have orally consented to the filing of this brief. But NACDL has not obtained the necessary written consent, necessitating this motion.

NACDL is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and exper-

tise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus and the death penalty. One way in which NACDL promotes the interests of its members is by participating as amicus curiae in cases whose outcome will have significant and far-reaching consequences for its members. *See Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Penry* v. *Johnson*, 532 U.S. 782 (2001).

This is such a case. As part of their private and *pro bono publico* service, NACDL's members regularly represent defendants accused of capital crimes. Given what is at stake in these proceedings, the need for clarity in the law is at its zenith. And nowhere is this need more pronounced than at the sentencing phase of these capital trials where, literally, an individual's life hangs in the balance. The Third Circuit Court of Appeals' decision below, however, which erroneously restricted and misapplied this Court's precedent of *Simmons v. South Carolina*, 512 U.S. 154 (1994), throws a large measure of uncertainty into this process. Following the Third Circuit's decision, prosecutors could sidestep a defendant's due-process entitlement to a parole-ineligibility instruction simply by placing a defendant's future dangerousness squarely at issue, but by refraining from *expressly* arguing the point. Thus, at a time when jurors are deliberating over whether a defendant should live or die, the jurors are not provided complete information to inform their decision. This is a matter of grave implications.

Given the breadth of experience and the day-to-day activities of its members, NACDL is uniquely situated to address for the Court a national and pragmatic perspective on the Third Circuit's decision. In addition, NACDL will further highlight the inconsistencies between established precedent of this Court and the Third Circuit's decision under review.

Accordingly, NACDL respectfully requests that the Court grant this motion for leave to file the attached brief amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus and the death penalty. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus and the death penalty, similar to the one presented here. *See Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Penry* v. *Johnson*, 532 U.S. 782 (2001).

STATEMENT OF THE CASE

Petitioner, Ronald Rompilla, was convicted of murder in the Pennsylvania Court of Common Pleas for Lehigh County. In Pennsylvania, like many states, once a defendant is convicted of a capital offense the only sentencing options are death or life without parole. Unlike every other state with such a scheme, Pennsylvania only informs the sentencing jury that life imprisonment precludes the possibility of parole if the trial judge determines the prosecution has explicitly raised the issue of the defendant's future dangerousness in the sentencing proceeding.

During the capital sentencing phase, the Commonwealth made numerous arguments that called into question Rompilla's future dangerousness. The jury, however, was not instructed that if he was sentenced to life in prison Rompilla would never be eligible for parole. App. 788, 799-803. [2]

At sentencing, the Commonwealth read into the record testimony from the victim of a prior rape and robbery committed by Rompilla in 1974 and framed Rompilla's most recent criminal activity as the product of a savage who became only more prone to violence after 14 years in prison. App. 647, 662-96, 780-81. As the Commonwealth presented the issues to the jury, the only "lesson" Rompilla learned from his previous lengthy prison term and his prior crimes was not to "leave anybody behind who can testify against you." App. 780. This focus on the inadequacy of incarceration followed by parole and release for Rompilla was further reinforced by testimony, elicited by the prosecutor, that Rompilla could not be rehabilitated, App. 752, and references by the prosecutor to the fact that Rompilla had been on parole when he committed the present crimes for only three and one-half months. App. 737, 741-42.

The judge instructed the jury that it must sentence Rompilla to death or to life imprisonment without instructing the jury that Rompilla would be parole ineligible. App. 614, 783.

During its deliberations, the jury asked three questions that demonstrated its concern about Rompilla's future dangerousness if he were ever released from prison. First, it asked: "If a life sentence is imposed, is there any possibility of the defendant ever being paroled?" App. 802. The court refused to answer the question, stating: "I'm sorry to say, I can't answer that question. That's not before you as such * * * . I – if there were other alternatives that you should consider we would have outlined them in the Charge, all right." App. 802-03. In separate inquiries several hours later, the jury asked additional questions about the circumstances surrounding Rompilla's prior release from prison and whether there was any attempted rehabilitation. App. 838. The trial court again provided no answers, and did nothing to inform the jury that these issues were not relevant because Rompilla would not be eligible for parole. App. 842-43.

On state collateral review, the Pennsylvania Supreme Court rejected Rompilla's claim that his due process rights were violated by the trial court's refusal to instruct the jury that Rompilla would not be eligible for parole. *Commonwealth* v. *Rompilla*, 721 A.2d 786, 795 (Pa. 1998). The court limited

[2] All appendix citations are to the appendix prepared for *Rompilla* v. *Horn*, 355 F.3d 233 (3d Cir. 2004).

its analysis to whether a history of felony convictions puts future dangerousness at issue, and held it did not because prior felony convictions "only address [Rompilla's] past conduct, and not his future dangerousness." *Id.*

Rompilla filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. After considering numerous arguments, the district court granted the writ based on its conclusion that Rompilla's counsel had been ineffective for failing to investigate and present mitigating evidence at the sentencing proceeding. *Rompilla* v. *Horn*, 2000 WL 964750, at *14 (E.D. Pa., July 11, 2000). The district court also concluded that the prosecutor did not argue future dangerousness and that the Pennsylvania Supreme Court's application of this Court's decision in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), although a "close issue," was not unreasonable. *Rompilla*, 2000 WL 964750, at *15.

The Commonwealth appealed to the Third Circuit Court of Appeals, which reversed the district court and denied Rompilla's habeas petition. Regarding the failure to give a life-without-parole instruction, the Court of Appeals did not consider whether the Pennsylvania Supreme Court's application of *Simmons* was reasonable. *Rompilla*, 355 F.3d at 265-66. Rather, the Court of Appeals engaged in its own independent analysis of *Simmons* and held that the state court had been "reasonable" based on a conclusion never reached by the state court – *i.e.*, that *Simmons* may be read "narrowly," to require a life-without-parole instruction only where the prosecutor explicitly argues that the defendant poses a future threat. *Id.*.

SUMMARY OF ARGUMENT

Rompilla was sentenced to death in violation of his due process rights because although his future dangerousness was at issue in the sentencing proceeding the jury was not informed that a sentence of life imprisonment means life without the possibility of parole. The Pennsylvania Supreme Court's contrary decision was an unreasonable application of

this Court's precedent in *Simmons*. There can be no question that the prosecution placed Rompilla's future dangerousness at issue in his sentencing proceeding.

The Court of Appeals' conclusion that the Pennsylvania Supreme Court reasonably applied *Simmons* is incorrect. Foremost, the Court of Appeals erroneously based its decision on its own, restricted analysis of *Simmons* rather than on the analysis actually employed by the state court. A federal court's independent analysis, which was not relied upon by a state court, has no bearing on whether that state court decision was a reasonable application of law.

Even on its own terms the Court of Appeals' legal conclusion is not supportable. As this Court recognized in *Kelly* v. *South Carolina*, 534 U.S. 246 (2002), a *Simmons* instruction should be given whenever a defendant's future dangerousness is at issue, and not just when the prosecution expressly states the defendant should be put to death to prevent future crimes. *Kelly* was itself an application of the rule from *Simmons*, not a new rule of law, and thus is as controlling as *Simmons*.

Pennsylvania is the only state that gives the sentencing jury the authority to impose the death penalty and provides the alternative sentence of life without parole but resists giving *Simmons* instructions. All of the 32 other states that employ such a system routinely give *Simmons* instructions or otherwise ensure the jury understands the sentencing options before it regardless of whether future dangerousness is at issue. At minimum, the Due Process Clause requires Pennsylvania to follow suit whenever future dangerousness is at issue. This Court should vacate Rompilla's death sentence and re-affirm its holding from *Simmons* that a life-without-parole instruction must be given whenever a defendant's future dangerousness is placed at issue. This case also highlights the need to clarify that future dangerousness can be placed "at issue" in any one or more of three ways: (1) express arguments by the prosecution; (2) introduction of

evidence of prior bad acts, or (3) questions from the jury regarding a defendant's parole eligibility.

ARGUMENT

I. THE STATE COURT UNREASONABLY INTERPRETED *SIMMONS*

Pursuant to this Court's decision in *Simmons*, the jury considering Rompilla's sentence should have been instructed that a sentence of life in prison meant a sentence of life without parole. The decision of the Pennsylvania Supreme Court that no such instruction was required "involved an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court of the United States," and requires that Rompilla be granted relief. 28 U.S.C. § 2254(d).

The Court of Appeals erred three times over in reaching a contrary conclusion. First, rather than reviewing the actual decision of the Pennsylvania Supreme Court to determine whether its application of *Simmons* was reasonable, the Court of Appeals erroneously considered whether some hypothetical court could have reasonably reached the conclusion reached by the Pennsylvania Supreme Court. Then the Court of Appeals compounded this error through its own overly restricted reading of *Simmons*, concluding that the life-without-parole instruction is only required when the prosecution explicitly argues future dangerousness, but not when the prosecution introduces evidence and/or makes arguments from which future dangerousness can be inferred. Finally, to support its reading of *Simmons*, the Court of Appeals had to conclude that this Court's decision in *Kelly*, announced an entirely new rule of constitutional law when in fact it merely applied the rule in *Simmons* to a different set of facts.

A proper application of the rule announced in *Simmons* and *Kelly* requires that jurors be informed that the alternative sentence to death is life without parole when future dangerousness is at issue. Future dangerousness is undeniably at issue when, as in this case, the prosecution argues that the

defendant has an ongoing pattern of violent behavior that will not be deterred through incarceration, and the jury demonstrates its interest in the future dangerousness of the defendant by specifically inquiring about the possibility of parole.

A. The Court of Appeals Used an Incorrect Standard in Determining that the State Court Reasonably Applied *Simmons*

The Pennsylvania Supreme Court's analysis of the *Simmons* issue is contained in a single paragraph of its opinion:

> Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendants' future dangerousness is at issue. Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The court rejected this argument in *Commonwealth* v. *May*, 551 Pa. 286, 710 A.2d 44, 47 (Pa 1998). As stated in that case, this aggravating circumstance only addresses Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due. [*Rompilla*, 721 A.2d at 795 (citation omitted).]

The state-court decision that no *Simmons* instruction was necessary was based solely on a conclusion that the aggravating circumstance of a significant history of past violent felonies did not constitute evidence of Rompilla's future dangerousness. This analysis, as discussed below, is a plainly unreasonable interpretation of *Simmons* – which requires a life without parole instruction whenever the issue of future dangerousness is raised – and it furthermore unreasonably applies *Simmons* to the evidence presented by the prosecution in this case.

The Court of Appeals may well have agreed. In finding that the state-court decision was "reasonable," it did not

address the reasoning actually employed by the state court. Instead, the Court of Appeals held that the state court's decision was "reasonable" based on a conclusion never reached by the state court – that is, that *Simmons* may be read "narrowly," to require a no-parole instruction only where the prosecutor explicitly argues that the defendant poses a future threat. *Rompilla*, 355 F.3d at 264-66. This was error by the Court of Appeals. Rather than reviewing the actual decision of the state court, it "invoked its own restrictive gloss on" *Simmons*, a "restrictive gloss" that was not actually applied by the state court. *Tennard* v. *Dretke*, 124 S. Ct. 2562, 2569 (2004). Because the Court of Appeals' restriction on *Simmons* was not actually relied upon by the state court, "it has no bearing on whether the [state-court] decision reflected an objectively unreasonably application" of clearly established law. *Wiggins*, 539 U.S. at 529-30.

In determining whether a state-court decision unreasonably applies clearly established Supreme Court precedent, this Court focuses on the actual reasoning employed by the state court in reaching its decision. *See, e.g., Lockyer* v. *Andrade*, 538 U.S. 63, 73-74 (2003) (reviewing actual reasoning employed by state court); *Price* v. *Vincent*, 538 U.S. 634, 640-42 (2003) (discussing reasoning employed in state-court decision); *Penry*, 532 U.S. at 796-97 (discussing possible interpretations of state-court decision); *Williams v. Taylor*, 529 U.S. 362, 393-98 (2000) (extensive discussion of reasoning from state court in applying this Court's ineffective assistance of counsel decisions). The Court of Appeals correctly noted that where a state-court decision on the merits includes *no* discussion of an issue, a federal court reviewing that decision under § 2254(d)(1) must make an independent determination as to whether the decision was contrary to, or an unreasonable application of, this Court's clearly established law. *See Rompilla*, 355 F.3d at 247-48 (*citing, inter alia*, *Weeks* v. *Angelone*, 528 U.S. 225, 237 (2000)). But where, as here, the state court decision includes a rationale for a determination on the merits, a federal court must review the reasoning actually employed, rather than some hypothetical basis on which the state-court decision might have been

based. *See Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curium) (state-court decision is not contrary to this Court's established law "so long *as neither the reasoning* nor the result of the state-court decision contradicts" established law) (emphasis added).

B. The Law Clearly Established by *Simmons* Requires a No-Parole Instruction When Future Dangerousness is at Issue

"Clearly established Federal law, as determined by the Supreme Court of the United States" encompasses "the holdings * * * of this Court's decisions as of the time of the relevant state-court decision." *Williams,* 529 U.S. at 412. The law that is clearly established by this Court's decision in *Simmons*[3] is that "[w]here the State *puts the defendant's future dangerousness in issue*, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury * * * that he is parole ineligible." *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring in the judgment) (emphasis added).

The Court of Appeals' restrictive reading of *Simmons*, which would require a no-parole instruction only where the prosecution *expressly argues* future dangerousness is not consistent with this Court's opinion in *Simmons*. There was no disagreement in *Simmons* that the prosecution had put Rompilla's future dangerousness at issue, and there should be none here as discussed *infra*. Although the Court's opinions in *Simmons* mentioned the prosecutor's closing argument, no member of the Court relied solely on that argument to determine that the State had put the defendant's future dangerousness at issue, or suggested that comparable closing

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[3] There can be no question that "*Simmons* applies here because it was decided before Rompilla's conviction became final upon conclusion of his direct appeal in 1995." *Rompilla*, 355 F.3d at 264 n.18.

arguments would be a necessary precondition for application of its rule.

Simmons' scope is confirmed by the Court's decision in *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), on which *Simmons* was based. *Skipper* did not rely on a prosecutor's closing argument. Instead, it held more broadly that due process requires "that a defendant not be sentenced to death 'on the basis of *information* which he had no opportunity to deny or explain.'" *Id.* at 175 (O'Connor, J., concurring in the judgment) (*quoting Skipper*, 476 U.S. at 5 n.1 (quoting *Gardner* v *Florida*, 430 U.S. 349, 362 (1977))).

Accordingly, the Court of Appeals had no basis for its finding that the holding of *Simmons* could reasonably be restricted to requiring an instruction of parole ineligibility "only where the prosecution *actually* 'argue[s]' that a defendant poses a future threat." *Rompilla*, 355 F.3d at 265 (emphasis added). As the Court of Appeals majority itself recognized, Justice O'Connor's controlling opinion in *Simmons* noted that a parole ineligibility instruction is required "where the State seeks to show the defendant's future dangerousness," where "the State sought to show that petitioner is a vicious predator who would pose a continuing threat to the community," or where the prosecutor puts "petitioner's future dangerousness in issue." *Id.* (*citing Simmons*, 512 U.S. at 175-17). In addition, even the "*Simmons* dissenters interpreted the plurality opinion as apparently requiring admission of parole ineligibility even when the prosecution does not argue future dangerousness." *Id.* at 265 (*citing Simmons*, 512 U.S. at 183 (Scalia, J., dissenting)).

The evidence relied upon by the Commonwealth against Rompilla surely put his future dangerousness at issue, requiring a no-parole instruction pursuant to the law clearly established by *Simmons*.

C. *Kelly* is an Application of *Simmons*, Not a New Standard.

There is no validity to the conclusion of the Court of Appeals that this Court's decision in *Kelly* must be ignored in

determining the reasonableness of the state court's application of *Simmons*. *Kelly* indeed post-dates the pertinent state court decision. This Court has been clear, however, that if the precedent in question itself only applies the rule from a case that pre-dates the pertinent state court decision, then that post-dated case also controls.

Wiggins is a good example. In *Wiggins* the state had argued that *Williams*, should be ignored because it post-dated the state-court decision. *Wiggins*, 539 U.S. at 522. This Court rejected that argument, holding that decisions interpreting established standards that do not make "new law" indeed constitute controlling precedent. *Wiggins*, 539 U.S. at 522.

The underlying ineffective assistance standard at issue in *Williams* had been announced by this Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Strickland* established a duty on the part of defense counsel to make reasonable investigation into his or her client's background in order that mitigation evidence might be discovered and presented. *Id.* at 690-91. "[R]easonableness" is gauged by professional norms. *Id.* at 688. Applying *Strickland*, this Court thus evaluated defense counsel's investigative performance in *Williams*, finding the background investigation to be deficient in light of, among other things, the ABA's Standards for Criminal Justice. *Williams*, 529 U.S. at 396. Thus, because *Williams* was only applying *Strickland*, this Court held in *Wiggins* that *Williams* "made no new law," and applied that case to the one before it. *Wiggins*, 539 U.S. at 522.

Likewise, the underlying standard for giving a life-without-parole instruction at issue in *Kelly* – like *Simmons*, also a case arising out of South Carolina and addressing a defendant's due-process entitlement to the instruction – had been announced by this Court nearly ten years earlier, in *Simmons*. *Kelly* no more made "new law" than *Williams*. Indeed, the *Kelly* majority expressly and repeatedly stressed that it was simply applying the standard originally set forth in *Simmons*. For example, at one point the majority chastised the state court for its "error in trying to distinguish *Simmons* in this way," 534 U.S. at 254, and at another point the majority

admonished the state court for its failure to recognize that part of the prosecution's argument being reviewed "echoed the one made in *Simmons* itself." *Id.* It is readily apparent that the *Kelly* majority was not expanding *Simmons*, but simply applying it.

This Court's application of *Simmons* in *Kelly* is no different than its application of *Strickland* in *Williams*. *Simmons* was clearly established, and the issue in *Kelly* was whether the state's evidence and arguments sufficiently implicated "future dangerousness" to warrant a *Simmons* instruction. The majority in *Kelly* evaluated the arguments and evidence presented in light of *Simmons*, comparing and contrasting the cases in an attempt to determine if the state in fact "raised the specter * * * of future dangerousness generally." *Kelly*, 534 U.S. at 252 (*citing Simmons*, 512 U.S. at 165). Similarly, the majority in *Williams* evaluated the arguments before it in light of *Strickland*. In the end, the *Kelly* majority concluded that the state's evidence and arguments sufficiently "echoed" *Simmons*, placing "the case within the four corners of *Simmons*." *Id.* at 255.

If the *Kelly* majority's approach to *Simmons* and "future dangerousness" is still good law, then the Court of Appeal's failure to consider *Kelly* controlling is error.

D. A Proper Application of *Simmons* Mandates Reversal of Rompilla's Death Sentence.

Under *Simmons* and *Kelly* this is a straightforward case: The Commonwealth here went further in implicating Rompilla's future dangerousness than did the prosecutor in either *Simmons* or *Kelly*. It is, of course, not necessary for a prosecutor to actually use the words "future dangerousness" to warrant a *Simmons* instruction. *Simmons*, 512 U.S. at 165. Were it otherwise, a prosecutor could evade *Simmons* simply by avoiding the term "future dangerousness" in his or her closing argument, while still putting future dangerousness at issue. Direct or indirect evidence of a future danger is sufficient to mandate a *Simmons* instruction.

> [E]vidence of dangerous "character" may show "characteristic" future dangerousness, as it did here. * * * Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms. [*Kelly*, 534 U.S. at 254.]

1. The *Simmons* prosecutor "generally" raised future dangerousness in much the same way as the Commonwealth did during the sentencing phase of Rompilla's trial. During closing arguments the *Simmons* prosecutor asked the jury "what to do with [petitioner] now that he is in our midst." *Simmons,* 512 U.S. at 157. The prosecutor went on, urging imposition of the death penalty as "a response of society to someone who is a threat. Your verdict will be an act of *self-defense*." *Id.* (emphasis added).

Before returning a sentence of death, the *Simmons* jury interrupted its deliberations and asked the court if a life sentence carried with it the possibility of parole. *Id.* at 160. The *Simmons* trial court responded – over defense counsel's objection – that parole eligibility was not to be considered and that the "terms of life imprisonment and death sentence" were to be understood in their ordinary meanings. *Id.* This Court reversed Simmons' death sentence, holding that failure to give a life-without-parole instruction when future dangerousness is at issue violates the due process clause.[4]

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[4] This Court similarly held in *Shafer* v. *South Carolina,* 532 U.S. 36 (2001), that a *Simmons* instruction was mandatory after the prosecutor introduced evidence of Shafer's "criminal record, past aggressive conduct, probation violations, and misbehavior in prison" during the penalty phase of his trial. *Id.* at 41. In addition, during closing argument the prosecutor quoted a witness who said Shafer and his accomplice "might come back." *Id.* at 43. Like *Simmons*, the *Shafer* jury inquired during deliberations if Shafer would ever be eligible for parole. *Id.* at 44. The trial court

This Court evaluated parallel facts in *Kelly*. The *Kelly* prosecutor opened the sentencing phase of the trial by telling the jury, "I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." *Kelly*, 534 U.S. at 248. The prosecutor later offered evidence that Kelly had fashioned a knife in prison and attempted escape by making plans to lure a female guard to his cell and hold her hostage. *Id.* Additional prosecution evidence established that Kelly was a sadist from an early age and harbored an "inclination to kill anyone who rubbed him the wrong way." *Id.* at 248-49.

Still, the trial court denied Kelly a *Simmons* instruction, concluding that the prosecutor's comments and evidence went to Kelly's character, not future dangerousness. *Id* at 249. The prosecutor then referred to Kelly in closing argument as, among other things, "Bloody Billy," and argued that someone as intelligent and "quick-witted" as Kelly was "a little more dangerous." *Id.* at 250. The jury sentenced Kelly to death without inquiring about parole eligibility. This Court, nonetheless, held that failure to give a *Simmons* instruction was reversible error. "A jury hearing evidence of defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." *Id.* at 253-54.

This case presents an even more compelling case for reversal. The obvious and irreducible import of the Commonwealth's sentencing arguments is that future dangerousness was at issue. The Commonwealth relied heavily on testimony from the victim of a prior rape and robbery committed by Rompilla in 1974 that was read into the record. App. 659-96. With that backdrop the Commonwealth framed Rompilla's most recent criminal activity as the product of a savage who became only more prone to violence after 14

refused to give a *Simmons* instruction, and this Court reversed. *Id.* at 45.

years in prison. App. 779-80. The prosecutor argued in closing that the similarities between Rompilla's 1974 crimes and his more recent activities were "absolutely frightening." App. 779-80.

> I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. [App. 779-80.]

The Commonwealth also argued that the only "lesson" Rompilla learned from a lengthy prison term and his prior crimes was not to "leave anybody behind who can testify against you." App. 780. The unmistakable inference from this statement is that another lengthy prison sentence would not be sufficient to protect society from Rompilla – *i.e.*, that Rompilla is a danger who would only be fully contained if the jury sentenced him to death. This argument was reinforced by testimony, elicited by the prosecutor, that Rompilla could not be rehabilitated. App. 752. The prosecutor also made references to the fact that Rompilla had been on parole when he committed the present crimes for only three and one-half months. App. 737, 741-42. To suggest such arguments do not touch on Rompilla's likely future danger to society if not put to death is to ignore the very logic of their appeal in the penalty phase.[5]

[5] Amicus believes that the introduction of prior bad acts is alone sufficient to warrant a *Simmons* instruction and thus a reversal in this case. But this prosecutor did much more than rely on Rompilla's criminal history during the penalty phase.

2. In this case, one need not speculate whether the sentencing jury harbored confusion over the meaning of a life sentence. It expressly said that it did. During its deliberations, the jury posed three inquiries to the court – all related to what was likely to happen to Rompilla if he was not sentenced to death. App. 802-03, 823-24, 838, 842-43.

The jury's first question was its most direct: "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" App. 802. The court refused to answer the question. App. 802-03. In separate inquiries several hours later the jury asked additional questions about the circumstances surrounding Rompilla's prior release from prison and whether there was any attempted rehabilitation. App. 838, 842. The trial court provided no answers and made equivocal comments about the relevance of these matters. App. 842-43. Such equivocation could very well have left jurors with the erroneous impression that a death sentence was the only way to ensure Rompilla would never be released from prison.

It can hardly be questioned that most juries lack accurate information about the precise meaning of "life imprisonment" as defined by the States. For much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term or years) in practice was understood to be shorter than the stated term. [*Simmons*, 512 U.S. at 169 (*citing* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61 (1993)).]

Explicit or implied prosecutorial appeals to a defendant's continued threat, if not sentenced to death, tend to exacerbate misconceptions about parole eligibility. Trial courts commonly confront this mix of confusion and fear through questions similar to those posed by this jury.[6] Heading off these questions with a *Simmons* instruction when the jury is charged assures that the jury properly understands the alternatives. Regardless, due process requires a candid response from a trial court if such questions later arise during deliberations. Refusing to answer such questions almost certainly prompts jurors to assume the worst.

> [O]ne of these particular jurors did not understand the meaning of the term [life imprisonment], since the jury sent a note to the judge asking, "Does the imposition of a life sentence carry with it the possibility of parole?" The answer here was easy and controlled by state statute. The judge should have said no. [*Simmons*, 512 U.S. at 173 (Souter, J. concurring).]

Further, unlike the *Simmons* jury – which imposed a death sentence only 25 minutes after being told to ignore parole eligibility – Rompilla's sentencing jury continued to telegraph its confusion through subsequent questions of the trial court. App. 802, 823, 838, 842. In fact, the jury only returned a death sentence after being told by the trial court to rely on its "own knowledge" of what rehabilitation services are available to Pennsylvania prisoners. App. 842-43. Such conduct signaled that the possibility of Rompilla ever being released, *i.e.*, future dangerousness, factored prominently into the jury's decision to impose a death sentence. Yet, Rompilla

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[6] *See Simmons*, 512 U.S. at 170 n.10 ("It almost goes without saying that if the jury in this case understood that the 'plain meaning' of life imprisonment was life without parole in South Carolina, there would have been no reason for the jury to inquire about petitioner's parole eligibility.")

was denied the opportunity to rebut such conclusions by demonstrating that if he was not sentenced to death he would remain in prison until the end of his natural life.

The Commonwealth, moreover, has only itself to blame for the present dilemma. The prosecutor's sentencing strategy here – using Rompilla's prior crimes to support an argument that he is a brute who with time will only become more violent – is common and permissible. App. 774-82. But this argument, as it routinely does, begged the very question this jury asked: "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" App. 802. When asked this question, due process requires that the trial court give a truthful answer. "The judge should have said no." *Simmons*, 512 U.S. at 173 (Souter, J., concurring).

3. It is difficult to harmonize the many Pennsylvania decisions addressing *Simmons*, but even the Pennsylvania Supreme Court has required a *Simmons* instruction on weaker facts than Rompilla presents, demonstrating that the Pennsylvania Supreme Court understood the rule from *Simmons* to be less restrictive than the position now advanced by the Commonwealth and endorsed by the Court of Appeals. In at least three instances following *Simmons*, the Pennsylvania Supreme Court or its members have concluded that indirect future dangerousness arguments warranted reversal or would have if *Simmons* applied. For *Simmons* purposes, the circumstances of Rompilla's sentencing proceeding are more compelling than any of these decisions.

In *Commonwealth* v. *Chandler*, 721 A.2d 1040 (Pa. 1998), a double-murder trial, the prosecutor made these comments during the penalty phase closing argument:

> Frankly, ladies and gentlemen, life imprisonment in this case is simply not enough. I am asking you with your verdict today, to stop Kevin Chandler, to stop him from ever hurting another woman again, to stop him from ever killing another woman again. [*Id.* at 1046.]

With these remarks and absent any subsequent inquiry from the jury regarding the meaning of a life sentence, a majority of the Pennsylvania Supreme Court concluded that future dangerousness was at issue. *Id.* at 1047. The court accordingly reversed Chandler's death sentence based on the trial court's failure to give a *Simmons* instruction *even in the absence of an express mention of the term "future dangerousness."* *Id.* (emphasis added).

> While the prosecutor did not actually use the words "future dangerousness," * * * [t]he absence of a precise phrase simply cannot overcome the effect of the prosecutor's statements, which was to inject the issue of Appellant's future dangerousness into the jury's deliberations in the penalty phase of the Appellant's trial. [*Id.* at 1046.]

The Pennsylvania Supreme Court's future dangerousness analysis in *Chandler* is inconsistent with its treatment of Rompilla. The Commonwealth presented graphic and inflammatory testimony from Rompilla's 1974 rape victim and then argued that despite the passage of nearly two decades the similarities between these crimes and Rompilla's more recent activities were "absolutely frightening." App. 779-80. The prosecutor further argued that the "lesson" Rompilla learned over the many years since initially convicted was to kill his witnesses. App. 780. These arguments were buttressed with evidence that Rompilla could not be rehabilitated. App. 737, 741-42, 752. Not surprisingly, the prosecutor's arguments led the jury to ask several questions during its lengthy sentencing deliberations about the meaning of a life term and Rompilla's prior sentence.

The prosecutor in *Commonwealth* v. *Trivigno*, 750 A.2d 243 (Pa. 2000), similarly secured a death sentence by drawing an escalating connection between Trivigno's latest crime, a homicide, and his prior convictions for criminal trespass and misdemeanor assault.

> Well, then you will decide whether or not this history is significant or not, whether or not these prior criminal convictions are a weather vane looking into the future, *whether or not they are significant in that they are a determinant of where the man is, where's he's [sic] going, not just where he's been, breaking in*, assault and now this. [*Id.* at 253 (emphasis in original).]

Moreover, the *Trivigno* jury likewise telegraphed its understandable apprehension following these remarks by asking the court, "Could you please define exactly what life without parole means? Is it in prison forever or is there still a chance for parole?" *Id.* at 254. As in *Chandler*, a majority of the Pennsylvania Supreme Court reversed Trivigno's death sentence because the trial court failed to give a *Simmons* instruction as requested by defense counsel, finding that the prosecution's argument of escalating wrongs was sufficient to put future dangerousness at issue. *Id.*

Finally, although agreeing that the sentence should stand on procedural grounds, at least two members of the Pennsylvania Supreme Court concluded in *Commonwealth* v. *Douglas*, 737 A.2d 1188 (Pa. 1999), *cert. denied*, 530 U.S. 1216 (2000), that the following comments during closing implicated future dangerousness for *Simmons* purposes:

> Remember Dr. Camiel said * * * that the prognosis for the defendant was poor, in fact [it] doesn't matter whether on the street or in jail he is going to act the same way, assaulting people.
>
> * * *
>
> If he is not going to conform his conduct to the requirements of the law, if he is going to be assaultive and violent on the streets as well as in jail, why should he be allowed to live?

> Why shouldn't he die just like Donald Knight did?
>
> * * *
>
> He will do what he wants to do when he wants to do it and his conduct is not going to change. Whether he is up in Holmesburg Prison, Dallas, Huntingdon, or on the streets of Philadelphia walking the Raymond Rosen Projects he will always be Robert Douglas.
>
> * * *
>
> Robert Douglas should just be plain put to death as we put mad dogs out of their misery * * * because there is nothing else you can do for them. He will always be what he is now. [*Id.* at 1202 (Saylor, J., concurring).]

These remarks collectively represent a more specific version of the Commonwealth's "lesson learned" comments before Rompilla's sentencing jury. But the most logical inference from both presentations is identical – if ever released, these defendants will surely engage in more of the same dangerous conduct, making a death sentence the only punishment that will halt such a possibility. Irrespective of any merit to this common prosecutorial argument, when it is rolled out before a death penalty jury, as it often is, due process requires a *Simmons* instruction to ensure that the jury understands the true alternatives with which it is faced.

II. PENNSYLVANIA IS ABERRANT IN REFUSING TO INFORM THE JURY WHEN THE ONLY ALTERNATIVE SENTENCE TO DEATH IS LIFE WITHOUT PAROLE

There are 33 states with capital sentencing systems that give the jury a direct role in selecting the sentence and provide for life without parole as an alternative to the death penalty.[7] Pennsylvania is now the only state that refuses to inform sentencing juries, as a standard part of the capital sentencing procedure, when a life sentence means life without the possibility of parole.

When this Court decided *Simmons* in 1994, there were 26 states that used juries in capital sentencing and authorized life-without-parole sentences as an alternate to death. *Simmons*, 512 U.S. at 167 n.7. At that time, Pennsylvania, South Carolina, and Virginia were the only states that refused to inform sentencing juries that life without parole was the only alternative to a death sentence regardless of whether future dangerousness was at issue. *Id.*

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[7] Thirty-eight states utilize the death penalty. Of those 38, New Mexico and Texas do not provide for the alternate sentence of life without parole in capital cases. *See* N.M. Stat. Ann. §§ 31-18-14.1; 31-20A; Tex. Crim. Code Ann. Proc. § 37.071. In Arizona, although the jury makes factual findings regarding the existence of aggravating or mitigating factors, and determines whether or not to impose the death penalty, the sentencing judge, not the jury, determines independently whether to sentence the defendant to life or life without parole. Ariz. Rev. Stat. § 13-703.01(A). In Montana and Nebraska the jury is responsible for deciding whether any aggravating factors have been proved beyond a reasonable doubt, but the judge retains ultimate sentencing authority. *See* Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. §§ 29-2520(f), 29-2520(h).

Twenty states in 1994 all provided that the jury in capital cases would be informed as a matter of course when the alternative to death was a life sentence without parole.[8] Nine states explicitly identified the jury's sentencing alternatives as death or life without parole – Alabama, Arkansas, California, Connecticut, Delaware, Louisiana, Missouri, New Hampshire, and Washington. *Id.*[9] Eight additional states empowered the jury to specify whether a defendant should be sentenced to death, to life without parole, or to life with the possibility of parole – Georgia, Indiana, Maryland, Nevada, Oklahoma, Oregon, Tennessee, and Utah. *Id.*[10] Three states required that the jury should be instructed if a life sentence in fact meant the defendant would not be parole eligible – Colorado, Illinois, and Mississippi. *Id.*[11]

These 20 states all continue the same or substantially similar practices today. None of these states has narrowed the situations in which jurors must be informed that a life sentence means life without possibility of parole.

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[8] The remaining three states – Florida, South Dakota, and Wyoming – had not addressed the issue in 1994. *Id.*

[9] These nine states continue the same practice today. *See* Ala. Code § 13A-5-46(e); Ark. Code Ann. § 5-4-603(b); Cal. Penal Code Ann. § 190.3; Conn. Gen. Stat. § 53a-46a(g); Del. Code Ann., tit. 11, § 4209(a); La. Code Crim. Proc. Ann., art. 905.6; Mo. Rev. Stat. § 565.030.4; N.H. Rev. Stat. Ann. § 630:5(IV); Wash. Rev. Code § 10.95.030.

[10] These eight states also maintain the same practice today. *See* Ga. Code Ann. § 17-10-31.1(a); Ind. Code § 35-50-2-9(d); Md. Code Ann. Crim. L. §§ 2-303(f)(1), 2-304; Nev. Rev. Stat. § 175.554(2)(c); Okla. Stat. Ann. Tit. 21 § 701.10(A); Or. Rev. Stat. §§ 163.105, 163.150; Tenn. Code Ann. §§ 39-13-204(a)-(f)(2); Utah Code Ann. § 76-3-207.5.

[11] Again, these states continue this practice today. *See* Colo. Rev. Stat. § 18.1.3-1201(1)(b); *People* v. *Gacho*, 522 N.E.2d 1146, 1166 (Ill. 1988); *Turner* v. *State*, 573 So. 2d 657, 675 (Miss. 1990).

Not only have the 20 states that in 1994 informed the jury when the alternative sentence to death was life without parole maintained similar practices, the uniform trend amongst the states has been to inform the jury when the alternate sentence to death is life without possibility of parole. Virginia and South Carolina have both changed their procedures to give juries this vital information even when future dangerousness is not at issue.[12]

Indeed, since *Simmons* was decided in 1994, nine additional states have addressed anew the question of whether and when jurors should be informed that the alternate sentence to death is life without parole.[13] These states have uniformly required that juries be informed when the alternative to death is life without parole.

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[12] Va. Code Ann. § 19.2-264.4; S.C. Code Ann. § 16-3-20(A).

[13] These developments have occurred as states either have added the option of a life sentence without the possibility of parole, or have had to restructure their sentencing procedures to give more authority to juries in response to this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002). In response to *Ring*, Nebraska and Montana have modified their capital sentencing procedures so that the jury is responsible for deciding whether any aggravating factors have been proved beyond a reasonable doubt, but the judge retains the ultimate sentencing authority. See Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. §§ 29-2520(f), 29-2520(h). Arizona instituted a procedure where the jury finds aggravating and mitigating circumstances and decides whether death is appropriate, but if a death sentence is not handed down, the judge determines whether the sentence should be life, or life without parole. Ariz. Rev. Stat. § 13-703.01(A). Where the judge retains the authority to impose the sentence, and/or to select between life or life without parole, "the sentencing authority is fully aware of the precise parole status of life-sentenced murderers," and the life without parole jury instruction loses relevance. See *Simmons*, 512 U.S. at 168 n.7.

New York has joined the ranks of states explicitly giving the jury the power to decide between death or life without parole.[14] Idaho, Kentucky, Ohio, and Wyoming empower the jury to decide whether the defendant is sentenced to death, life without parole, or life with the possibility of parole.[15] Kansas, New Jersey, North Carolina, and South Dakota either mandate that the jury be instructed in capital cases when a life sentence is in fact life without parole, or do so as a matter of common practice.[16]

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[14] N.Y. Crim. Proc. Law § 400.27(10). In June 2004, the Court of Appeals of New York invalidated the state death penalty statute related to an adjacent jury instruction, which informed the jury that if they deadlocked, the defendant would get neither death, nor life without parole, but would in fact be eligible for parole. *See People* v. *LaValle*, __ N.E.2d __, 2004 WL 1402516 (N.Y. June 24, 2004). This ruling did not affect the portion of the death penalty statute empowering the jury to sentence defendants to death or life in prison without parole.

[15] Idaho Code § 19-2515(7); Ky. Rev. Stat. Ann. § 532.025(3); Ohio Rev. Code Ann. § 2929.03; Wyo. Stat. Ann. §§ 6-2-102(b), 6-2-102(d)(ii).

[16] *State* v. *Kleypas*, 40 P.3d 139, 270 (Kan. 2001) (holding that when the defendant requests it, the trial court must inform the jury of the number of years the defendant would serve if not sentenced to death); Kan. Stat. Ann. § 21-4624(e) (amended by 2004 Kan. Sess. Laws ch. 102) (instituting life without parole as the alternative sentence to death); N.J. Stat. Ann. § 2C:11-3(f); N.C. Gen. Stat. § 15A-2002 (stating that the judge must instruct the jury that a life sentence means life without parole); *State* v. *Moeller*, 616 N.W.2d 424, 460-461 (S.D. 2000) (noting that the jury instructions in a capital case specify that life is life without parole, but not further describing what "life without parole" means).

This uniform trend is one toward providing jurors with more information about the alternative sentences a defendant faces if they do not sentence him or her to death.[17] Pennsylvania alone paddles against this tide of change, not only refusing to automatically inform the jury when a life sentence means life without parole, but also actively trying to narrow the application of *Simmons* with overly formalistic interpretations of when future dangerousness is at issue, as the Commonwealth has done in this case.

III. THIS COURT SHOULD CLARIFY THAT A BRIGHT-LINE STANDARD EXISTS FOR DETERMINING WHEN A LIFE-WITHOUT-PAROLE INSTRUCTION IS REQUIRED IN DEATH PENALTY CASES

A sentence of death is qualitatively different from all other sentences in kind, rather than degree. A reviewing court, and we as a society, must be confident that a jury's sentence of death in a particular case is reliable in all respects.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. [*Solem* v. *Helm*, 463 U.S. 277, 312 n.4 (Burger, C.J., dissenting, joined by White, J., Rehnquist, J., and O'Connor, J.) (*quoting Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.)), *overruled, Harmelin* v. *Michigan*, 501 U.S. 957 (1991).]

[17] This nationwide trend toward states providing capital juries with more complete information about the life-without-parole alternative to a death sentence bears materially upon this Court's due-process analysis. *See Lawrence* v. *Texas*, 539 U.S. 558, 570 (2003) (holding that Texas' prohibition on homosexual conduct violated the Due Process Clause and relying in part on the fact that "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them"); *id.*, at 573 ("The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

The jury's sentence of death is not reliable in this case. The prosecutor's arguments, the jury's questions, the Pennsylvania Supreme Court's application of *Simmons* in other cases, and the legal isolation in which Pennsylvania finds itself by refusing to give a *Simmons* instruction all render the death sentence imposed on Rompilla unreliable and constitutionally deficient.

The only way to provide reliability in this case, and to ensure that other death sentences do not similarly suffer from this defect, is to establish a bright-line rule. Juries must be instructed on the availability of a sentence of life without parole in a capital case when the prosecution introduces evidence of prior bad acts in the penalty phase or the jury inquires about the parole eligibility of the defendant. Such a rule will clarify *Simmons* and avoid the subjectivity and inconsistency inherent in a reviewing court's evaluation of whether a reference to prior bad acts expressly or implicitly put future dangerousness at issue.

A bright-line rule will not preclude prosecutors from arguing that a pattern of prior bad conduct merits the ultimate sanction. Likewise, sentencing juries will not be prevented from considering such conduct, nor will they be dissuaded from asking for clarification about sentencing options. Jurors will, instead, get honest answers to their questions and be able to make the type of informed judgment that our Constitution demands when they impose the most serious of penalties.

CONCLUSION

For the foregoing reasons, this Court should vacate Rompilla's sentence. Rompilla's future dangerousness was placed at issue through the prosecution's introduction of evidence of prior bad acts and argument tying those prior bad acts to Rompilla's present and future conduct, and through the jury's inquiry about the possibility of parole.

This Court should also clarify that *Simmons* establishes a bright-line rule that requires a life-without-parole instruction whenever a defendant's future dangerousness is placed at issue by express prosecution argument, introduction of evidence of prior bad acts, or questions from the jury about parole eligibility.

Respectfully submitted,

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